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No. 92-151

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CALIFORNIA HOUSING SECURITIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

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The court of appeals, in a sharp deviation from this Court's takings jurisprudence, held that the *per se* rule requiring compensation for physical takings should be disregarded where the taking is authorized by a federal regulatory statute. In its opposition to certiorari, the government defends the merits of the decision below (unsuccessfully, in our view), but offers little reason why this Court should decline to examine the court of appeals' departure from settled principles and to rule for itself on what is, at minimum, a significant unresolved question of takings law.

1. The government baldly asserts (Br. in Opp. 5) that petitioner "attempts to extend" the *per se* rule that governs physical takings. That unsupported assertion has it backwards. Petitioner seeks merely to apply the rule as promulgated by this Court. The court of appeals, however, seeks to *narrow* that *per se* rule, on grounds that misapply current takings law.

As we noted in the petition (at 7-8), the courts below did not dispute that the government actions here were "a permanent physical occupation" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982)) of petitioner's property. Indeed, the type of conduct involved—the physical seizure and operation of a private business—was identified in *Loretto* as one of the classic forms of physical taking that the Court had previously recognized as automatically triggering a duty to pay compensation. *Id.* at 431; *see United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). Thus, it requires no extension of the established *per se* rule for physical takings to conclude that the Fifth Amendment entitles petitioner to compensation for the value of its business that the government seized and never returned.

The government argues that the rule is inapplicable because petitioner had no "historically rooted expectation of compensation for such a seizure." Br. in Opp. 8 (quoting Pet. App. 7a). This argument is circular. The essence of the *per se* rule is that physical takings are so destructive of basic property rights that they necessarily require compensation—without regard to the property owner's expectations. Therefore, it is nonsense to argue that the rule is inapplicable because of the property owner's expectations; that approach makes the *per se* rule a nullity.

2. The government's effort to support its expectation theory by drawing an analogy between a preexisting easement on real property and the statutory authority to appoint a conservator (Br. in Opp. 7-8) is misconceived.

An easement is a long-recognized kind of property right that can modify fee simple ownership and that may be owned by anyone. If a person purchases property subject to an easement—whether the easement is held by another private party or by a government entity—the purchaser's property rights are limited accordingly; plainly, use of the easement does not infringe his or her rights.

By contrast, a government regulator's statutory authority to take over a business under certain conditions cannot reasonably be characterized as a property right; for one thing, it is not the sort of right that can be held by a private party. Rather, it is akin to the government's power of eminent domain. That power may someday be invoked to divest a landowner of his or her property, but its mere existence does not suggest that the landowner has less than the full panoply of property rights. Thus, it is one thing to say that a statute authorizes the government to take over a business or that it puts the owner on notice of that possibility. But it is sheer sophistry to argue that the takeover does not infringe upon the owner's property rights; the takeover is a permanent physical seizure of the owner's property that should be compensated. Indeed, as we noted in our petition (at 11), the government's argument is inconsistent with *Pewee Coal* (a case it refuses to acknowledge in its brief), where the Court held that the government's seizure of coal mines was a compensable taking notwithstanding that it was authorized by statute.[1]

[1] We note that, even if expectations analysis generally has some validity in the context of a physical taking, petitioner had no expectation that its property could be permanently seized without compensation. The government argues (Br. in Opp. 10) that for more than one hundred years federal law has provided for the appointment of a receiver to wind up the affairs of an insolvent national banking association. That law is considerably narrower than the statute, not enacted until 1982, under which the government seized Saratoga. Presumably, the reason there are no cases—either pro or con—addressing the takings question under the old statute is because it was invoked to take over insolvent banking

Ultimately, the government's importation of expectations analysis into physical takings doctrine threatens an open-ended incursion into fundamental property rights—at least in the context of regulated industries. If Congress can eliminate the duty to pay compensation simply by using a statutory authorization to put property owners on notice of the possibility of a taking, then the Just Compensation Clause can scarcely act as a bulwark against government invasion of private property rights. This erosion of the existing constitutional protection against physical takings calls for review by this Court.

3. Apart from the novel expectations theory developed by the court of appeals, the government suggests two other reasons why this Court's *per se* rule should not be applied to the government takeover of petitioner's business. Neither of these contentions has merit.

a. The government argues that "Saratoga voluntarily agreed to an uncompensated seizure of its business" (Br. in Opp. 9) in order to obtain the benefits of federal deposit insurance. *See also id.* at 6-7. But this Court has never embraced the startling proposition that the government can condition a benefit upon the waiver of a person's Fifth Amendment rights—particularly when that benefit is essential to the person's ability to conduct a business, as was true here. On the contrary, as we noted in the petition (at 13), the Court has indicated that a property owner's ability to conduct his business "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17.

b. The government also argues (Br. in Opp. 10) that "there was no 'physical occupation' of petitioner's property by the government" because the property was not

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associations, not ones valued at $16 million. Neither that statute nor the 1982 law involved here evinces an intent to wipe out the Fifth Amendment right to compensation for a government seizure of private property.

"occupied for the use or benefit of the occupier," but rather for the purpose of "protect[ing] Saratoga's assets." If the government means to suggest that its takeover was for Saratoga's benefit, the suggestion is ludicrous as a factual matter. Surely, if the government unilaterally seizes a business worth $16 million and then conducts a fire sale of its assets that leaves the owner with nothing, it cannot maintain that it was acting solely for the owner's benefit.

As a legal matter, whether "petitioner's property was . . . occupied solely for the use and benefit of the government" (Br. in Opp. 6) has no relevance to the takings inquiry. It is well settled that property may be taken for "public use" within the meaning of the Fifth Amendment even if it is distributed to private parties rather than to government coffers. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-43 (1984). Indeed, it is hard to see why the government views this point as distinguishing the cases relied upon in the petition; if anything, there was less direct benefit to the government in those cases than exists here. In *Loretto*, the government did not benefit from the cable installation; it was just facilitating the availability of a particular service to its citizens. *See* 458 U.S. at 425-26. In *Pewee Coal*, the government did not seek to profit from the mining operation; it took over the business for the purpose of averting a strike and ensuring continued coal production. *See* 341 U.S. at 115-16. Thus, the government's actions here constituted a physical taking of petitioner's property, irrespective of the direct benefit to the government, and just compensation is due.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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